STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2007
v	No. 272549 Kalkaska Circuit Court
FRANK J. MATTOON, Defendant-Appellant.	LC No. 04-002461-FC

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant appeals his sentences imposed after remand for his jury convictions of kidnapping, MCL 750.349, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Following defendant's initial sentencing, another panel of this Court remanded for resentencing, holding that the trial court erred when it found it could not score points for Offense Variable (OV) 7, aggravated physical abuse, in the absence of actual physical abuse. *People v Mattoon*, 271 Mich 275, 278; 721 NW2d 269 (2006).

On remand, the trial court scored OV 7 at 50 points based on defendant's actions during his nine-hour imprisonment of the victim. The trial court also found, over defendant's objection, that the numerous assaults defendant committed during the imprisonment justified a score of 25 points for OV 13, continuing pattern of criminal behavior.

On appeal, defendant first argues that the trial court erred when it scored OV 7 at 50 points because no evidence showed that the conduct allegedly forming the basis for the OV 7 score "somehow substantially increased the fear over the same fear that was used in the felonious assault." He also contends that this conduct was already scored in OV 4, degree of psychological injury to victim, and OV 19, interference with the administration of justice, and thus to score it again under OV 7 would result in "impermissible double counting." Similarly, defendant maintains that scoring OV 7 in his kidnapping conviction was inappropriate because this conduct

was already taken into account in the sentencing information report (SIR) that was scored for his assault conviction.[1]

We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, to the extent this issue also entails a question of statutory interpretation, it is reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

After reviewing the record, we agree with the trial court that a score of 50 points for OV 7 was justified. The evidence at trial showed that defendant held the victim at gunpoint for nearly nine hours. The victim testified that defendant informed her numerous times that he was going to kill her and himself. At one point, defendant made her look down the barrel of the gun, and said he was going to "blow [her] brains out." The victim also testified that several times defendant took the bullets out of the gun and say, "That ones' got your name on it, and that one's got my name on it, and that one's just in case it jams." The victim stated that defendant told her to think about what it would be like when her son, who was in eighth grade, came home and found yellow tape around the house and both her and defendant dead inside. The victim additionally testified to a time when defendant was standing behind her, and she heard the gun click. Defendant's actions went far beyond those "necessary" to commit the crimes of kidnapping or felonious assault. The nature of defendant's threats and the length of time during which they occurred clearly show that defendant's conduct was deliberately "designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The evidence supported the scoring decision. *Hornsby*, *supra* at 468-469.

Defendant's "impermissible double counting" arguments appear to be based on the premise that a trial court may generally not impose a sentence above the sentencing guidelines for reasons already scored within the guidelines. See MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

Defendant is mistaken. The guidelines contemplate that a criminal episode will be scored as a whole, and facts considered in scoring one offense can be considered in scoring other offenses that are part of the same criminal episode. *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003). In *Cook*, *supra*, the defendant argued that MCL 777.21(2),[2] which requires a separate sentence calculation for each offense, indicated a legislative intent that conduct pertinent to the commission of one offense could not be used in calculating the sentence guidelines range for a separate offense. He specifically argued that MCL 777.21(2) restricted the trial court's ability to consider his flight from the police in calculating his sentencing guidelines range for his assault conviction because his flight from the police did not occur during the assault. This Court disagreed:

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[1] Defendant's presentence investigation report contains SIR scoring for both convictions.

[2] MCL 777.21(2) states, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part."

> The limitation suggested by defendant is not found in the plain language of the statute. "Nothing may be read into [a] statute that is not within the manifest intent of the Legislature as gathered from the act itself." In drafting the sentencing guidelines scoring instructions, the Legislature could have expressly prohibited sentencing courts from considering facts pertinent to the calculation of the sentencing guidelines range for one offense from being also used to calculate the sentence guidelines range for another offense, but it did not do so. Moreover, where the Legislature has not precluded it, we find that where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense. [*Id*. at 641 (citations and quotations omitted).]

Thus, defendant's argument that the trial court could not consider conduct involved in his felonious assault when scoring the guidelines for his kidnapping conviction is without merit. Defendant has pointed to nothing in the language of the sentencing guidelines scoring instructions that would prevent a trial court from considering the same conduct when scoring each OV. We note that MCL 777.22(1) specifically provides in pertinent part, "For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20." This language supports a finding that each OV should be separately scored in relation to the entire transaction. Therefore, we hold the trial court did not err when it scored OV 7 at 50 points.

Defendant next argues that the trial court erred when it scored OV 13 at 25 points, because the kidnapping and assault convictions were his only two crimes against a person. He maintains that the additional uncharged assaults could not be counted because they formed part of the "single transaction" of his imprisonment of the victim.

In calculating OV 13, a trial court scores 25 points when the defendant engages in "a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). "All crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

Defendant's argument has some merit, but it does not warrant resentencing. The statute describes a "pattern of felonious criminal activity" and this one incident, which admittedly occurred over a lengthy time period, does not seem to fit this definition. The Legislature has specifically addressed circumstances in which certain convictions should not be separately counted if they stem from a single incident. See MCL 777.43(2)(e) and (f). Because the Legislature did not expand this particular exception into a general rule, we will not usurp its role by generally applying the exception to this case. See *People v Adams*, 262 Mich App 89, 97-98; 683 NW2d 729 (2004); *People v Ramsdell*, 230 Mich App 386, 392-393; 585 NW2d 1 (1998).

In any event, we hold that any error in the scoring of OV 13 is harmless, given the 50 points added to defendant's OV score under OV 7. Were we to remove the 25 points scored under OV 13, defendant's grid scoring would not change. He was rescored at 125 OV points. For kidnapping, a class A offense, anything over 99 OV points would place him in the C VI grid, with a recommended minimum sentence range of 135 to 225 months in prison. MCL 777.62.

Finally, defendant argues that the trial court improperly considered facts not found by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has ruled that *Blakely*, *supra*, does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis